STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 2004
v	No. 246031 Lenawee Circuit Court
CORDALL R. NEAL, Defendant-Appellant.	LC No. 02-009793-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, carrying a weapon with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a habitual offender, third offense, MCL 769.11, to life imprisonment for the murder conviction, fifty-seven months to ten years' imprisonment for the carrying a weapon offense, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant left his residence in Clinton Township and drove with relatives to Adrian, Michigan to visit his son. Defendant knew that his relatives carried weapons, although he denied seeing any weapons that evening. He also knew that his relatives were looking for a particular individual named Jamal Bradley, who had allegedly stolen money from their parents, defendant's grandparents. Defendant testified that he feared Bradley because he had heard rumors that Bradley was threatening to shoot him. Yet, he knew that his relatives were seeking Bradley out to determine a repayment schedule for the money he had taken from their parents. Defendant testified that he drove to the home of his son, but did not stop there because he believed that his ex-girlfriend had a guest over.

Defendant was driving a van with his cousin seated in the front passenger seat and his two uncles seated in the back seat. Defendant came upon a vehicle that he believed was driven by Bradley. He was instructed by his relatives to pull up alongside the vehicle because they wanted to talk to Bradley. He complied and heard a gunshot followed by "all types of gunshots." Defendant drove off because he "just wanted to assist 'em [sic] to get away." Defendant testified that there was no plan or discussion to shoot the driver of the vehicle. The van driven by defendant was stopped a short distance from the shooting. The weapons used by the occupants had been discarded between the location of the shooting and the location of the traffic stop. At

the police station, defendant learned that Bradley was not driving the vehicle, and Marcus Newsom had been shot and killed instead.

On cross-examination, defendant acknowledged that he had three children who lived in the area, but he only attempted to see his son. He acknowledged that there was nothing to preclude him from stopping in to visit his son. Defendant also acknowledged that he made a telephone call to try and locate Bradley when he got into town. Although he had testified that he was "afraid" of Bradley, defendant nonetheless tried to locate Bradley when accompanied by his relatives whom he assumed were carrying guns. Defendant could not definitively testify to where the first gunshot came from. After the gunshot, defendant "stopped for a second, then the back swingin' doors comes (sic) open, gunshots, I hear a bunch of gunshots then." Defendant knew that his front passenger, his cousin, was shooting, but he did not know, but guessed, that his uncles were also shooting.

Witness Carolyn Sue McMillian testified that defendant telephoned her home on the evening of the shooting and asked her about the whereabouts of Bradley. The day after the shooting, McMillian received a telephone call from defendant. Defendant apologized to McMillian about the shooting and advised her that the gunshots were not meant for Newsom. Following a jury trial, defendant was convicted as charged.

Defendant first alleges that the trial court erred in denying his motion to suppress his statements.[1] We disagree. When reviewing a trial court's determination of the voluntariness of a confession, an appellate court engages in de novo review of the entire record. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). While a trial court's factual findings are reviewed under the clearly erroneous standard, *id*., an appellate court is required to examine the entire record and make an independent determination of the issue as a question of law. *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999).

On the record available, we cannot determine that the trial court's factual findings were clearly erroneous. The totality of the circumstances are to be considered when determining whether a statement is voluntary. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). The factors that may be considered include the age of the accused, his education or intelligence level, his prior contacts with police, the nature and extent of the questioning, the length of the detention, the mental and physical state of the accused, and any threats or abuse. *Id*. Ultimately, the test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicate that it is freely and voluntarily made. *Id*. "To knowingly waive *Miranda*[2] rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *People v Cheatham*, 453 Mich 1, 28; 551 NW2d 355 (1996).

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[1] In the trial court, defendant alleged that the statement was not knowing, intelligent, and voluntary under the totality of the circumstances. On appeal, defendant alleges that the statements were the "fruit of the poisonous tree." Despite the change in strategy, we nonetheless have addressed the merits of the claim on appeal.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

In the present case, two police officers testified regarding their conversation with defendant and his waiver of his *Miranda* rights. The testimony indicated that defendant was engaged in minor conversation and *Miranda* rights were administered when the topic of the conversation led to the shooting incident. The trial court concluded that the testimony of the officers was credible, and defendant did not present any testimony to contradict the officers. Under the circumstances, we cannot conclude that the trial court's factual conclusions were clearly erroneous. *Daoud, supra*.[3]

Defendant next alleges that the trial court abused its discretion in denying the defense motion to quash the bindover where insufficient evidence of premeditation and deliberation were presented. We disagree. "The evidentiary error committed at the preliminary examination stage … does not require automatic reversal of the subsequent conviction absent a showing that defendant was prejudiced at trial." *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). See also *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003) ("If defendant went to trial and w[as] found guilty, any subsequent appeal would not consider whether the evidence adduced at the preliminary examination was sufficient to warrant a bindover.") Defendant does not allege prejudice at trial as a result of the bindover. Consequently, any challenge to the bindover on appeal does not provide relief to defendant.[4]

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[3] We note that on appeal and in the supplemental brief, defendant contends that his statements should have been suppressed based on police misconduct and "fruit of the poisonous tree." Defendant contends that the manner of the interviews, in "rapid succession," and the impropriety of a pre-*Miranda* interrogation tainted any subsequent written and taped statements. However, we are bound by the lower court record. The only testimony presented regarding pre-*Miranda* conversations was given by a police officer. The officer testified that they engaged in small talk, and *Miranda* rights were given when the nature of the conversation turned to the shooting. Defendant did not testify to the contrary, and defendant's version of the interrogations as presented in the narrative form of the brief are not supported by the testimony or the trial court's factual findings. Defendant's reliance on *Missouri v Seibert*, ___ US ___; 124 S Ct 2601; 159 L Ed 2d 643 (2004) is misplaced. In *Seibert, supra*, the police knowingly and purposefully admitted to engaging in "question first" tactics where *Miranda* warnings were administered only after obtaining a confession from the defendant. The objective of the confession first tactic is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed. However, in the present case, we have no record evidence to support the conclusion that police administered *Miranda* warnings only after defendant confessed. Defendant did not testify that he was only given the rights after confessing. Accordingly, defendant's attempt to fit within the parameters established by *Seibert* is without merit.

[4] In any event, the question of a defendant's intent presents a question of fact to be inferred from the circumstances by the trier of fact. *People v Tower*, 215 Mich App 318, 322; 544 NW2d 752 (1996). Where there is credible evidence that both supports and negates the intent requirement, a factual question exists that is left for resolution by the jury. *People v Neal*, 201 Mich App 650, 655; 506 NW2d 618 (1993). Because of the difficulty of proving a defendant's state of mind, minimal circumstantial evidence is sufficient. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). In the present case, defendant indicated that he came to Adrian to visit his son. After failing to meet his son, defendant drove in the area looking for Bradley with whom his relatives were in a dispute. He also telephoned McMillian and inquired about Bradley's

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Defendant next alleges that the trial court erred in refusing to provide a jury instruction regarding self-defense. We disagree. Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Jury instructions must include the charged offense elements and must not exclude material issues, defenses, and theories if the evidence supports them. *Id*.

"The killing of another person in self-defense is justifiable homicide only if the defendant honestly and reasonably believes his life is in imminent danger or that there is a threat of serious bodily harm and that it is necessary to exercise deadly force to prevent such harm to himself." *People v Riddle*, 467 Mich 116, 127; 649 NW2d 30 (2002). The first requirement of a claim of self-defense or defense of others is that a defendant act in response to an assault. *Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). To act in lawful self-defense when a defendant uses deadly force, the defendant must have an honest and reasonable belief of the danger of serious bodily harm or death and may only employ the amount of force necessary to defend himself. *People v Heflin*, 434 Mich 482, 507-509; 456 NW2d 10 (1990). To satisfy the necessary element of self-defense, the defendant must try to avoid the use of deadly force if he can safely do so by applying nondeadly force or utilizing an avenue of retreat. *Riddle, supra* at 119.

As an initial matter, we note that defendant's testimony does not support the theory of self defense. Defendant testified that he drove the vehicle with his cousin and two uncles as passengers. He testified that his passengers in the vehicle possessed weapons, but defendant denied that he had or fired a weapon. Based on this testimony, the theory of self-defense was inapplicable because defendant did not perform any act in defense of himself or others. Moreover, defendant did not testify that he had any reasonable belief of imminent danger or serious bodily harm.[5] While defendant testified that he "feared" Bradley, there was no attempt to determine whether the driver of the vehicle was in fact Bradley. Without any testimony regarding any acts of the victim, defendant's testimony, that he was merely the driver of the vehicle without knowledge of any plan to shoot the victim, does not support a self defense theory.

Even assuming that defendant had performed an act in furtherance of self defense, the evidence admitted at trial failed to support the self defense instruction. Defendant alleged that the testimony regarding the location of the first gunshot and a gunshot hole in his van entitled him to a self defense instruction. However, there was no evidence that the victim had a gun and fired it into the van. It was equally as plausible that the hole in the van occurred before the shooting or was caused by defendant's relatives. There was no testimony to establish an assault

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whereabouts. Defendant knew that his relatives were angry over money taken from relatives and carried weapons. Although defendant indicated that there was no plan to shoot Bradley, the facts and circumstances of the case presented a question for the trier of fact regarding the nature of the visit to Adrian, Michigan. Accordingly, the challenge to the premeditation and deliberation evidence at the preliminary examination is without merit.

[5] Defendant's uncles and cousins did not testify at trial. Defendant does not allege or provide any documentary evidence from trial to indicate that his relatives acted in lawful self defense and that defendant has standing to assert their right to act in self defense.

by the victim, *Smith, supra*, and defendant did not exercise his duty to pursue an avenue of retreat. *Riddle, supra*. After the first gunshot, defendant as the driver of the van could have fled the scene, but remained while he heard "all types of gunshots." Accordingly, the trial court did not err in denying the request for a self-defense instruction where the evidence did not support the instruction. *Canales, supra*.

Lastly, defendant alleges that he was denied a fair and impartial trial based on prosecutorial misconduct. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich app 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich app 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Review of the record reveals that the defense raised the issue of race in closing argument, although race never had any bearing on the crime or the circumstances surrounding the crime. The prosecutor began to respond to the issue in closing argument. Defense counsel objected to the statement and did not request a curative instruction or a mistrial.[6] The trial court essentially sustained the objection by stating that the comment was "inappropriate at this time." Because the prosecutor was responding to an issue raised by the defense and the discussion was limited in duration and scope, the comment does not require reversal. See *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). The trial court instructed the jurors that the arguments of the attorneys were not evidence. Accordingly, defendant's challenge is without merit.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[6] A defendant may not acquiesce to the trial court's handling of a request, then raise objection as error before the appellate court. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).